

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD  
OF THE STATE OF DELAWARE**

<b>CLIFFORD PRITCHETT,</b>	)	
	)	
Employee/Grievant,	)	<b>DOCKET No. 13-09-593</b>
	)	
<b>v.</b>	)	
	)	<b>DECISION AND ORDER</b>
<b>DEPARTMENT OF HEALTH AND SOCIAL SERVICES,</b>	)	
<b>DELAWARE PSYCHIATRIC CENTER,</b>	)	
	)	
Employer/Respondent.	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on May 1, 2014 in the Delaware Public Service Commission Room at the Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

**BEFORE** Martha K. Austin, Chair, John F. Schmutz, Paul R. Houck, and Victoria Cairns, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

**APPEARANCES**

Rae M. Mims  
Deputy Attorney General  
Legal Counsel to the Board

Deborah L. Murray-Sheppard  
Board Administrator

Clifford Pritchett  
Employee/Grievant *pro se*

Kevin R. Slattery  
Deputy Attorney General  
on behalf of the Department of  
Health and Social Services

### **BRIEF SUMMARY OF THE EVIDENCE**

The Department of Health and Social Services (DHSS) offered and the Board admitted into evidence without objection eleven exhibits (A-K). DHSS called four witnesses: James VanWright (who testified by telephone); Roxina Rumley; Gregory Valentine; and William Wharton.

The employee/grievant, Clifford Pritchett (Pritchett), did not offer any exhibits into evidence. Pritchett testified on his own behalf and called the same witnesses, with the exception of Greg Valentine.

### **FINDINGS OF FACT**

Pritchett works as a Food Service Supervisor within the Dietary Unit at the Delaware Psychiatric Center (DPC) where he has been employed for more than 17 years. He is regularly assigned to the 11:00 a.m. to 7:00 p.m. shift and is responsible to insure that meals are provided to residents and that their dietary needs are met. His duties include direct supervisory responsibilities over Food Service Workers who are State merit employees and who work in the DPC dietary unit.

DPC contracts with an outside vendor to manage the Dietary Unit. This arrangement has been in effect for over 15 years. Sodexo, Inc., the vendor on July 9, 2013, manages the daily operations of the main kitchen, dining room, food service areas and related activities, including oversight of State merit employees who work in these areas. Sodexo provides: direct staff supervision; direct monthly staff trainings on safety, food services and DPC policy updates; management of staff scheduling for dieticians, cooks and cook staff; staff time requests; and management of the assignment of duties and other activities that impact operational processes.

Roxina Rumley, DPC Compliance Administrator, was responsible for oversight of the

dietary unit, including managing issues arising under the state Merit Rules, disciplinary processes and the employee evaluation system (including performance plans and annual reviews). She was also Pritchett's direct supervisor.

On July 9, 2013, during a Dietary Unit staff meeting conducted by James Van Wright (Sodexo's Assistant Food Services Director at DPC at that time<sup>1</sup>), attendees were asked to review and sign an acknowledgement of receipt of the Dietary Chain of Command Memorandum issued by Hospital Administrator, Denise Jenkins, and distributed previously to some dietary staff via e-mail. The purpose of the memorandum was to clarify the chain of command, specifically as it related to merit employees, merit system supervisors, and Sodexo management. The memorandum did not change the existing relationships but was issued as a result of questions and conflicts which had arisen.

Pritchett declined to sign the acknowledgement of receipt. In a statement he prepared later that day for submission to Rumley, Van Wright alleged Pritchett walked past him and then "turned to the staff sitting in the restroom [*sic*]<sup>2</sup> area and stated 'I told you that this would happen, y'all better get a lawyer like I did'." *Agency Exhibit D*.

Based on Van Wright's statement, Rumley completed a disciplinary report, in which she concluded Pritchett had violated the DHSS Beliefs and Principles and Merit Rule 12.1. She noted Pritchett had received prior discipline for exhibiting unprofessional behavior. Rumley recommended suspension as the appropriate level of discipline.

At some point thereafter, the matter was referred for investigation within DHSS. By email dated August 2, 2013, Management Analyst Rmanda Chapman requested Pritchett submit

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<sup>1</sup> Van Wright testified he left Sodexo employment at some point after the July 9, 2013 incident.

<sup>2</sup> There is some dispute between the testimony of Van Wright and Pritchett as to where this incident occurred. Van Wright testified the meeting was in the "main kitchen break room, while Pritchett testified it was in the main dining room.

a written statement.<sup>3</sup> In her email, Chapman alleges Pritchett “encouraged other subordinate staff members not to sign and acknowledge receipt [of the memorandum] either.” *Agency Exhibit E*.

It is undisputed that none of the four dietary unit staff who were present at July 9, 2013, meeting to discuss the memorandum were interviewed or asked to provide statements. Van Wright testified in response to the Board’s question that none of the second shift employees acted any differently or insubordinately after the July 9 incident.

Pritchett responded to Chapman by providing a written statement on August 7, 2013, where he recounted the events of July 9, 2013. Pritchett denied encouraging other employees not to sign for the Memorandum and asserted he did not know who signed and who did not sign. Pritchett stated he was joking with the staff after the meeting when he said, “...don’t do that or you’re going to need a union rep or a lawyer like I do,” and everyone laughed. *Agency Exhibit F*.

In a letter to Pritchett, dated August 19, 2013, CEO Gregory Valentine, advised Pritchett he was recommending a three-day suspension for the July 9, 2013 incident because “Pritchett’s behavior was deemed as insubordinate, unprofessional and unbecoming of a supervisor,” in violation of Merit Rule 12.1 and the DHSS Beliefs and Principles. Valentine advised Pritchett of his right to a pre-decision meeting in this matter. Valentine informed Pritchett by letter on September 12, 2013 he would be suspended without pay for three days. *Agency Exhibit 1*. Valentine testified he did not conduct an independent investigation of this incident but relied upon the information provided to him by subordinates in determining the discipline.

Prior to this incident, Pritchett had been issued a written reprimand on June 9, 2013, and a one-day suspension on July 3, 2013. *Agency Exhibits H, I*. Pritchett was also counseled as part

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<sup>3</sup> Management did not directly speak to or interview Pritchett about the July 9, 2013 incident.

of an interim performance review process about the need to “fortify his shift.” The interim review prepared by Rumley noted, “Since March 2013 when direct supervision was taken over by Sodexo, there has been conflict with Mr. Pritchett accepting and adhering to the direction of Sodexo management...” *Agency Exhibit K*.

### **CONCLUSIONS OF LAW**

As a preliminary matter the Board denied the Motion to Dismiss filed by DHSS on April 23, 2014. DHSS argued 29 Del.C. §5949(a) only allows for a direct appeal to the MERB of a suspension of more than 30 days, or of suspensions totaling more than 30 days within any one year. Because Pritchett is grieving a three-day suspension, DHSS argued a direct appeal to the MERB was not available.

The Board addressed this issue thoroughly in a prior decision, *Beverly A.Y. Carr v. Department of Health and Social Services*<sup>4</sup>, in which it held, “Section 5949(a) only requires that an employee have a right of direct appeal over a suspension of more than 30 days in any one year. It does not limit the Board’s authority to hear a direct appeal from a suspension of lesser duration.”

Merit Rule 12.1 provides:

**Employees shall be held accountable for their conduct. Disciplinary measures up to and including dismissal shall be taken only for just cause. “Just cause” means that management has sufficient reasons for imposing accountability. Just cause requires: showing that the employee has committed the charged offense; offering specified due process rights specified in this chapter; and imposing a penalty appropriate to the circumstances.**

Pritchett does not claim that DHSS denied his specified due process rights.

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<sup>4</sup> Carr v. DHSS, Docket No. 09-01-438 (March 5, 2009).

Pritchett was suspended for “allegedly” violating State Employee Merit Rule 12.1 and DHSS Beliefs and Principles. The September 12, 2013 suspension letter states, “[d]uring a dietary staff meeting, participants were asked to review and sign acknowledgement of receipt of the Dietary Chain of Command memorandum issued by Denise Jenkins. It is alleged that you were disrespectful, negated a directive from your supervisor, refused to sign acknowledgement of receipt, and proceeded in encouraging subordinate employees to likewise disregard the directive. You are quoted as stating, ‘I told you this would happen, y’all better get a lawyer like I did.’ Your behavior has been deemed as insubordinate, unprofessional and unbecoming of a supervisor.” *Agency Exhibit 1* (emphasis added).

The Board concludes DHSS/DPC failed to conduct an adequate investigation of the July 9 incident involving Pritchett and Wright and therefore did not reach its conclusion based on all of the available facts and evidence. Agency management relied heavily on written statements and reported information from other individuals in making their decision. At no point did any management representative conduct interviews with the four dietary unit staff who were present during the incident and who Pritchett allegedly encouraged to not sign the acknowledgement interviewed. Nor was the Grievant interviewed. Consequently, the Board concludes as a matter of law that the Agency failed to provide corroborating evidence to support its determination that Pritchett encouraged others to be insubordinate.

The ultimate determination in this case requires a credibility assessment. Only two of the individuals who were involved in the incident (Pritchett and Van Wright) testified at the hearing. Van Wright’s testimony was received telephonically. It is noted that Van Wright’s contemporaneous statement does not allege that Pritchett encouraged other employees not to sign the acknowledgement, nor does that record reveal whether the other staff members present did or did not sign it.

The Board finds as a matter of law that both Pritchett and Van Wright are credible and that their testimony was not materially different. The Board notes there was tension between Van Wright and Pritchett, which may have resulted from a conflict of personalities.

Prior to late May, 2013, Pritchett had worked at DPC for more than 17 years with an essentially clean disciplinary record. The Board believes DPC should have interviewed Pritchett prior to issuing the disciplinary report and should have interviewed the other witnesses to the incident before issuing discipline.

Pritchett admitted to refusing to sign the acknowledgement of receipt when asked by VanWright. Pritchett should have been aware that his behavior towards Sodexo management had been a problem in the recent past. Pritchett had received prior discipline and had been counselled concerning his inappropriate interactions with Sodexo management.

Prior misconduct can be taken into account for progressive discipline to determine the appropriate penalty. However, prior disciplinary actions cannot be used to prove the existence of the conduct for which the employee is being disciplined, but only to show that the employee was on notice that such behavior was unacceptable and that failure or refusal to modify the problematic conduct could and would result in further discipline.<sup>5</sup>

In deciding whether a penalty was appropriate to the circumstances, the Board takes into account mitigating factors (such as length of service, successful rehabilitation efforts) as well as aggravating factors (such as prior related disciplinary actions within a reasonable period of time). DPC witnesses testified that since the incident on July 9, Pritchett has reformed his conduct and there have been no further disciplinary issues. Pritchett also sincerely expressed his desire to continue to work and to be a productive and reliable member of the DPC staff.

The Board concludes as a matter of law that there was an inappropriate interaction

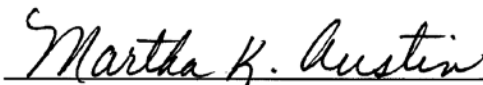
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<sup>5</sup> *Grievant v. DHSS*, MERB 12-06-546, at p. 7 (March 6, 2013), citing *Steiner v. City of Akron*, 2000 WL 960858, at p.4 (Ohio App., July 12, 2000))

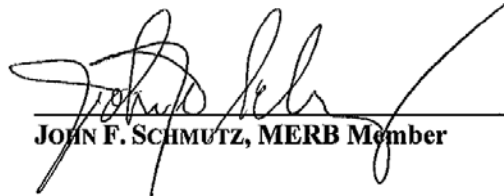
between Pritchett and Van Wright on July 9, 2013, for which progressive discipline can be imposed. The Board concludes the three-day disciplinary suspension without pay was not appropriate considering all the circumstances and facts as presented. Nevertheless, some level of discipline is warranted as a consequence of Pritchett's admitted inappropriate conduct.

### **ORDER**

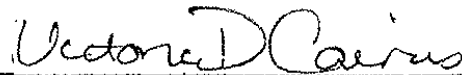
It is this **14th** day of **July**, 2014, by a unanimous vote of 4-0, the Decision and Order of the Board to deny in-part Pritchett's appeal in part and to grant his appeal, in part. The Board orders DHSS to reimburse Pritchett for lost wages and benefits for the three-day suspension without pay, which resulted from the July 9, 2013 incident. The discipline shall remain documented in Pritchett's personnel file, consistent with Merit Rule 12.8 as a three day administrative suspension.



MARTHA K. AUSTIN, MERB Chairwoman



JOHN F. SCHMUTZ, MERB Member



VICTORIA D. CAIRNS, MERB Member



PAUL R. HOUCK, MERB Member



## **APPEAL RIGHTS**

29 Del. C. §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 Del. C. §10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
- (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
- (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: **July 14, 2014**

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Board Counsel

MERB website